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No. 91-1653

In The
Supreme Court of the United States
October Term, 1991

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN, and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the filed rate doctrine announced in cases such as *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), applies to claims for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

PARTIES TO THE PROCEEDING

The caption identifies all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed. Northwestern Bell Telephone Company, on whose behalf this brief is submitted, became known as US West Communications, Inc. as of January 1, 1990. It is a wholly-owned subsidiary of US West Markets Group, Inc., which is a wholly-owned subsidiary of US West, Inc. US West Communications, Inc. has no subsidiaries. US West NewVector Group, Inc. is the only less-than-wholly-owned subsidiary of US West, Inc.

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RESTATEMENT OF THE CASE

A. Proceedings and Disposition Below

The petition seeks to bring this action before this Court for a second time. In 1989, the Court held that the facts alleged in the amended complaint, if proven, would constitute a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Upon remand, the district court reaffirmed its previous ruling (not considered in the first appeal) that petitioners' claim for damages is barred by the filed rate doctrine and dismissed the complaint. The court of appeals affirmed, and petitioners ask this Court again to resurrect their claim.

This action was commenced in the United States District Court for the District of Minnesota in July 1986 on behalf of a purported plaintiff class of all purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners allege that Northwestern Bell engaged in dealings with members of the Minnesota Public Utilities Commission ("the MPUC") that constitute bribery in violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42. They claim a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, respondent has violated several provisions of RICO. In a single allegation applicable to both legal theories, petitioners claim that the alleged violations injured all members of the purported class in that the rates each of them was required to pay for respondent's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; they ask the

district court to determine what are "fair and reasonable" rates and award them as damages their payments in excess of those court-determined rates. Amended Complaint, ¶ 75.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. It then moved to dismiss all or various parts of the complaint on a number of different grounds.

By Order dated November 21, 1986, the district court, by the Honorable Harry H. MacLaughlin, granted Northwestern Bell's motion, holding: (1) that the facts alleged in the complaint do not constitute a "pattern of racketeering activity" under RICO; (2) that petitioners' allegation under section 1962(a) of RICO fail to state a claim, in that Northwestern Bell is alleged to be both the "person" and the "enterprise" under that section; and (3) that, even if petitioners adequately allege violations of RICO, their claims under that statute are barred by the filed rate doctrine, in that they seek to have the court establish that the "reasonable" rates for Northwestern Bell's services were something other than the rates promulgated by the MPUC. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 648 F. Supp. 419 (D. Minn. 1986). Accordingly, the court dismissed petitioners' RICO claims with prejudice. Petitioners' motion to "alter or amend," *i.e.* reconsider, the judgment of dismissal was denied by Order dated February 18, 1987. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 653 F. Supp. 908 (D. Minn. 1987).

The court of appeals affirmed the judgment of the district court. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987). In doing so, it considered only the issue of RICO "pattern" and did not address the other bases for the district court's ruling. This Court reversed the court of appeals' judgment on "pattern" grounds and remanded the case for further proceedings,

explicitly noting that it did not consider the other grounds on which the district court had relied in dismissing the action. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 234 n.1 (1989). Rather than address those issues immediately upon remand, the court of appeals returned the case to the district court to give it the opportunity to reconsider its 1986 ruling in light of this Court's opinion and other intervening developments. Order, No. 87-5121 (8th Cir. Oct. 30, 1989).

When the case returned to the district court, Northwestern Bell renewed its motion for dismissal, both on the grounds on which the court had previously ruled and on grounds that had not been reached in the 1986 ruling. By Memorandum and Order dated April 4, 1990, Judge MacLaughlin again ordered that the complaint be dismissed. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 734 F. Supp. 879 (D. Minn. 1990). The court reaffirmed its 1986 ruling that petitioners' claims are barred by the filed rate doctrine. It also held that petitioners' state law claim is barred by the judgment in a parallel action in Minnesota state court (*see* p.5, *infra*).[1]

Petitioners again appealed, and the court of appeals again affirmed. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485 (8th Cir. 1992). The court of appeals' judgment is dated January 15, 1992. The present petition was filed on April 14, 1992.

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[1] The district court did not reach numerous other grounds for dismissal urged by Northwestern Bell, including contentions that RICO is unconstitutionally vague; that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of 18 U.S.C. § 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of 18 U.S.C. § 1962(c). It also did not readdress its 1986 ruling that Northwestern Bell cannot be both a "person" and an "enterprise" for purposes of 18 U.S.C. § 1962(a).

B. Related Proceedings

During the nearly six years that this action has been pending in federal court, there have been other proceedings in other forums based on the same facts as are alleged here, the results of which are relevant to the present petition.

First, petitioners commenced a parallel action in Minnesota state court shortly after the original decision of the district court in 1986. The factual allegations and legal theories in that action were identical to those of the amended complaint here, except that petitioners asserted a claim for "unjust enrichment" in addition to their bribery- and RICO-based claims. The state action was dismissed in June 1987, and the Minnesota Court of Appeals affirmed that dismissal in March 1988, holding: (1) that there is no private right of action under either Minnesota statutory or common law for damages caused by alleged bribery of public officials; (2) that petitioners' RICO claims were barred, pursuant to the doctrine of *res judicata*, by the final judgment of dismissal in this case (which had been affirmed by the Eighth Circuit and on which this Court had not yet granted review); and (3) that petitioners' "unjust enrichment" claim, being a collateral attack on a ratemaking decision of the MPUC, was barred by Minn. Stat. § 237.26. *H.J. Inc. v. Northwestern Bell Corp.*, 420 N.W.2d 673 (Minn. App.), *rev'w denied* (Minn. 1988).

Another related action was an administrative proceeding by the MPUC itself. When the allegations on which the amended complaint rests first became publicly known early in 1986, the Minnesota Department of Public Service and the Attorney General of Minnesota requested that the MPUC reconsider various of its prior decisions affecting Northwestern Bell that allegedly had been "tainted" by the company's supposedly improper activities. These included virtually all MPUC decisions that conceivably could be

at issue in the instant action. In an Order dated April 2, 1987, the MPUC found no evidence of criminal wrongdoing.[2] It also found that most of the matters on which redeliberation was sought had not been affected by Northwestern Bell's alleged conduct and did not need to be reexamined. However, the MPUC did find that its decision in a matter known as Docket 83-600, which had originally been issued in July 1984 and on which all appeals had been completed, involved the "appearance of impropriety," so that the proceeding should be reopened and the 1984 decision redeliberated. In ordering this redeliberation, the MPUC did not find that any particular vote in the prior proceeding had been improperly influenced, but only that a review of the entire record on a *de novo* basis would clear the air of any concern as to past impropriety.

The results of the redeliberation were announced by Order dated April 3, 1987, approving a new schedule of rates that, for a variety of complex, regulatory policy-based reasons, was lower than the rate schedule the MPUC had first approved in 1984. Northwestern Bell was ordered to adjust its *prospective* rates accordingly. After limited additional proceedings in the MPUC, Northwestern Bell implemented new rates, effective May 17, 1987, that are approximately $9 million per year lower than the rates that were in effect when the case at bar was commenced. The MPUC's

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[2] In so finding, the MPUC reached the same conclusion as a Ramsey County, Minnesota, grand jury that heard evidence concerning Northwestern Bell's actions relating to the MPUC and voted to return no indictments. *See* Minneapolis Star Tribune, Feb. 26, 1987, at 1A, 9A. Thus, petitioners' assertion (Petition at 11) that the rates charged by Northwestern Bell pursuant to MPUC order in Docket 83-600 have "already been recognized to have been tainted by Respondent's acts of bribery" is simply false. None of the several courts and agencies that have looked into the matter has ever characterized Northwestern Bell's conduct in this regard as criminal. Indeed the MPUC itself found no evidence even of procedural impropriety with respect to most of the proceedings apparently embraced by petitioners' RICO claim.

two orders were affirmed in December 1987 by the Minnesota Court of Appeals. *Matter of Minnesota Public Utilities Comm'n*, 417 N.W.2d 274 (Minn. App. 1987), *cert. denied*, 488 U.S. 849 (1988).

Finally, in response to a request from the MPUC in its April 3, 1987 Order, the State of Minnesota brought an action to compel Northwestern Bell to refund amounts collected by it in accordance with the MPUC's 1984 Order in Docket 83-600 that exceeded the new rates established by the MPUC, upon redeliberation, in 1987. *State of Minnesota v. Northwestern Bell Telephone Co.*, Civil File C8-87-487340 (Ramsey Cty., Minn., Dist. Ct.). That action was settled in September 1989, and refunds totalling approximately $32 million (plus interest) have been made.

C. Factual Allegations

Because this action was disposed of on the pleadings in the district court, there is no factual record. The allegations of petitioners' amended complaint, which are adequately summarized at pages 8 through 10 of the Petition, must be assumed, for present purposes, to be true. Northwestern Bell wishes to make it plain, however, that it denies any illegality in its dealings with the MPUC. *See also* note 2, *supra*. It is confident that, if this action were ever brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.

REASONS FOR DENYING THE WRIT

Petitioners seriously misrepresent the substance and effect of the judgment below. The court of appeals did *not*, as petitioners would have the Court believe, "carve[] out an . . . implied immunity from RICO jurisdiction for Northwestern Bell based on

its status as a regulated utility." Petition at 13. Rather, the decision below holds only that the filed rate doctrine -- a rule of general application that has long been recognized by this Court -- applies to claims asserted under RICO in the same way as it applies to claims asserted under any other legal theory. Thus, the court of appeals did not create a "utility exception" to RICO, but only held that there is no "RICO exception" to the filed rate doctrine. This decision does not conflict with the decision of any other court of appeals and is entirely consistent with relevant decisions of this Court.

I. The Court Of Appeals Correctly Held That Petitioners' Claim For Damages Is Barred By The Filed Rate Doctrine As Articulated By This Court.

Petitioners' amended complaint describes the injury for which they seek to recover in this action as follows:

> The plaintiffs and the class they seek to represent, were damaged in that, by reason of the actions alleged in Count I-V herein, the compensation Northwestern Bell was allowed to receive by the P.U.C. was *in excess of what would be fair and reasonable* charges to plaintiffs and members of the class, and that *said unfair and unreasonable compensation* was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in this complaint.

Amended Complaint, ¶ 75 (emphasis added).

Petitioners thus seek to recover damages for the alleged violations of RICO measured by the difference between the rates the MPUC approved and the amount a jury finds would have been approved but for the alleged wrongdoing. As the courts below correctly held, this theory of damages runs squarely afoul of the filed rate doctrine, under which federal courts will not entertain

claims premised on the contention that the "reasonable" rate for regulated services is something other than the rate promulgated or approved by the relevant regulatory agency.

This Court has repeatedly applied this principle, regardless of the legal basis for the claim that something other than the filed rate should properly have been charged. *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) (antitrust); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) (fraud); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (breach of contract); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (antitrust); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ____, 110 S. Ct. 2759 (1990) (breach of contract). As the Court explained in *Keogh, supra*:

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. *The rights, as defined by the tariff, cannot be varied or enlarged by* either contract or *tort of the carrier.*

260 U.S. at 163 (emphasis added).

The Court has also made clear that the filed rate doctrine does not, by barring particular types of damage claims, amount to recognition of an immunity for regulated utilities from the laws under which such claims are brought. In *Square D, supra*, the Court rejected the argument that application of the doctrine to an antitrust claim was contrary to cases disfavoring implied immunity from the antitrust laws, saying:

> We disagree . . . with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity . . . .

476 U.S. at 422. The Court observed that "a critical distinction remains between an absolute immunity from *all* antitrust scrutiny and a far more limited non-availability of the private treble-damages remedy." *Id.*, n.28 (emphasis in original).

Similarly, in the present case, the court of appeals did not recognize a total exemption from RICO for regulated utilities. Its opinion has nothing whatever to do with the extensive criminal and civil remedies available to the Government under the statute. The court did not even hold that utilities are always immune from civil damage liability under RICO. It held *only* that the claim for damages asserted *in this case* may not be maintained because it challenges rates promulgated by the agency having the exclusive power to make intrastate telephone rates in Minnesota.

Far from creating a "public utilities" exception to RICO, the true effect of the decision below is to *refuse* to recognize a "RICO" exception to the long-standing filed rate doctrine, whereby utility customers may not maintain collateral attacks, in any guise,

on the rates enacted by utility regulatory bodies.[3] The decision was plainly correct under the prior filed rate decisions of this Court. As will now be shown, it does not conflict with the decision of any other court of appeals, and is consistent with this Court's RICO decisions.

II. This Case Presents No Conflict Among The Circuits.

Petitioners' primary argument as to why this Court should grant certiorari is the assertion that the Eighth Circuit's decision conflicts with a decision of the Eleventh Circuit, *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), and a decision of the Second Circuit, *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"). This assertion is wrong in both respects.

First, petitioners presumably were unaware of the fact that, a few days before they filed their petition, the Eleventh Circuit vacated the panel opinion in *Taffet* and set the case for rehearing *en banc*. *Taffet v. Southern Co.*, No. 90-7088 (11th Cir. April 10, 1992) (reproduced in the appendix to this brief for the Court's convenience). This order, by vacating the panel opinion relied upon by petitioners, has the effect of reinstating, pending rehearing

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[3] Petitioners' primary support for their assertion that the courts below created a "utility exception" to RICO is a single sentence from the district court's 1990 opinion, 734 F. Supp. at 888, which they quote at least three times. Petition at 7-8, 13, 17. But the district court's opinion is not under review here. Even if that sentence could be read as recognizing a blanket "utility exception" (which Northwestern Bell submits it cannot), there is absolutely nothing in the Eighth Circuit's opinion to suggest that it shared the district court's view in this regard or endorsed such an "exception." On the contrary, the court of appeals noted that the portion of the district court's opinion in which the sentence appears was "not the basis for the district court's dismissal of the complaint, but simply provided 'additional support' for its ruling that the filed rate doctrine barred [petitioners'] RICO claims." 954 F.2d at 494.

en banc, the two district court decisions under appeal in *Taffet*. Both of those decisions, *Carr v. Southern Co.*, 731 F. Supp. 1067 (S.D. Ga. 1990), and *Taffet v. Southern Co.*, No. 89-V-712-N, 1990 U.S. Dist. LEXIS 4189 (M.D. Ala. Jan. 5, 1990), agree with the Eighth Circuit's holding, in the instant case, that the filed rate doctrine applies to civil RICO claims in the same manner and to the same extent as it applies to claims asserted under any other legal theory.[4]

The Eighth Circuit's decision in the instant case also does not conflict with the Second Circuit's decision in *LILCO*. Petitioners are forced to acknowledge that the *LILCO* court never considered the filed rate doctrine, and are reduced to speculating about how that court would have ruled if confronted with a defense based on that doctrine. Petition at 20. They should likewise admit (although they do not) that *LILCO* involved only questions, having to do with the "clear statement" doctrine and principles of *Burford* abstention, with which the Eighth Circuit was not presented and that it expressly declined to decide. 954 F.2d at 495. In short, this case "conflicts" with *LILCO* only in the legally meaningless sense that a utility defendant prevailed in the former and lost in the latter based on entirely different grounds. This is hardly the kind of "conflict between circuits" contemplated by this Court's Rule 10.1(a), and it is not one that should commend itself to the Court's discretionary jurisdiction.

The present case is the first and, thus far, the only case in which a court of appeals has finally decided the question posed by this petition -- whether the filed rate doctrine applies to RICO

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[4] Moreover, the Eighth Circuit's decision does not conflict, as petitioners assert, even with the now-vacated panel decision in *Taffet*. The Eighth Circuit obviously was aware of that decision, but distinguished it based on facts unique to this case. 954 F.2d at 491-92.

claims. Respondent respectfully submits that this question is not one of such urgent public importance that this Court should undertake to decide it the first time it is presented. The question may not arise again in the lower courts with any frequency.[5] If it does, and the Court eventually is presented with conflicting decisions from the circuits, its ultimate resolution will benefit from the varying viewpoints that more extensive consideration by the courts of appeals will provide. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983).

III. This Case Does Not Conflict With This Court's Prior RICO Decisions.

Petitioners also argue that the decision below is contrary to this Court's prior decision in the present case and the Court's other RICO decisions. Again both assertions are wrong.

First, it is absurd to assert that the decision below is contrary to this Court's prior ruling in this case. The Court considered and decided only one technical question of RICO pleading -- whether "multiple schemes" must be alleged and proved in order to establish a "pattern of racketeering activity." It acknowledged that the 1986 district court judgment had also rested on the filed rate doctrine, and explicitly noted that it was not considering that issue. 492 U.S. at 234 n.1.

The Court's prior decision clearly did not, as petitioners suggest, direct that this case go forward without regard to other legal barriers that might exist to petitioners' claims. That decision is wholly irrelevant to the filed rate ground on which the district

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[5] The actual precedential impact of the Eighth Circuit's decision may be quite limited, given the extent to which the court relied upon specific facts resulting from unusual aspects of Minnesota's regulatory process and the remedies available thereunder. *See* 954 F.2d at 491; *see also* pp. 5-7, *supra*.

and appellate courts relied in their decisions upon remand from this Court.

The decision below also is consistent, rather than inconsistent, with the Court's decisions in other cases. While cases such as *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), have rejected judicial attempts to add to the elements of a violation as defined in the statute, it can hardly be said that the Court has rejected all "attempts to limit" RICO, as petitioners claim. On the contrary, in *United States v. Turkette*, 452 U.S. 576, 583 (1981), the Court held that a RICO "enterprise" must be an "entity separate and apart from the pattern of activity in which it engages," a "limiting" interpretation on which many subsequent RICO claims have foundered. In *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987), the Court held that civil RICO claims are governed by the four-year statute of limitations applicable to civil antitrust claims rather than the five-year federal "catchall" statute governing criminal RICO claims, the various longer or shorter state statutes that lower courts had theretofore applied, or (as Justice Scalia suggested) no limitations period at all. Again, the result was to "limit" the viability of some RICO claims that would have been permitted if a different result had been reached.

Only this Term, again relying on an analogy to the antitrust laws, the Court held that a RICO plaintiff may recover only for injuries that were proximately caused by the defendant's violation, rejecting the more "liberal" or less "limiting" standard of factual, or "but for," causation. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 60 U.S.L.W. 4225 (U.S. March 24, 1992). The Court based this conclusion on the fact that the statutory language creating the RICO civil damage remedy, 18 U.S.C. § 1964(c), is drawn directly from section 4 of the Clayton Act, 15

U.S.C. § 15, which has always been interpreted as carrying a proximate-cause requirement within it. As the Court said:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them. Proximate cause is thus required.

60 U.S.L.W. at 4228 (citations omitted).

This reasoning applies equally to validate the Eighth Circuit's decision in the present case. The filed rate doctrine, like the requirement of proximate cause, is part of the meaning that courts have given to the phrase "injury to business or property" for purposes of the Sherman and Clayton Acts. *Keogh*, *supra*; *Square D*, *supra*. The same words are used in RICO, and they should be read as having the same meaning in both statutes. If paying a rate approved by the competent regulatory agency cannot give rise to a claim of "injury" under the Clayton Act, as *Keogh* and *Square D* hold, no more can "injury" be claimed in the same circumstances under RICO, for the reasons recently stated in *Holmes*.

CONCLUSION

This Court has never held, as petitioners seem to think, that claimants under RICO enjoy some sort of special immunity from legal principles that apply generally to all legal claims, even if those principles may have the effect of "limiting" recovery in a particular case. In the present case, the court of appeals did no more than to apply one such principle that this Court has repeatedly reaffirmed in a variety of contexts -- the filed rate doctrine -- to bar petitioners' RICO claims. In doing so, the court acted consistently with all relevant decisions of this Court and created no conflict with the decision of any other court of appeals.

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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May 8, 1992

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7088

M. R. TAFFETT and ROBERT M. FIERMAN, on behalf of themselves and all of the persons, corporations, municipalities, and other entities, other than the defendants, who are similarly situated,

Plaintiffs-Appellants,

versus

THE SOUTHERN CO., SOUTHERN COMPANY SERVICES, INC., ALABAMA POWER COMPANY and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

No. 90-8452

FREDERICK RODGERS CARR, CARR SALES COMPANY, O.E.M. PRODUCTS, INC., TIMOTHY DUNN STOKELY, III and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

THE SOUTHERN COMPANY, SOUTHERN COMPANY SERVICES, INC., GEORGIA POWER COMPANY, and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama and the Southern District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 1991, 11th Cir., 1991, ___ F.2d ___)

(April 10, 1991)

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, COX, BIRCH and DUBINA, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above causes shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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*Judges R. Lanier Anderson, III and J. L. Edmondson have recused themselves and will not participate.

Senior Judge Frank M. Johnson, Jr., who was a member of the original panel, has elected not to further participate in this matter. See 28 U.S.C. §46(c).